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No. 90-1102

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1990

ROBERT E. GIBSON,

Petitioner,

v.

THE FLORIDA BAR, et al.,

Respondents.

On Writ of Certiorari from
the United States Court of Appeals
for the Eleventh Circuit

**BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONER**

RONALD A. ZUMBRUN

*ANTHONY T. CASO

DEBORAH J. MARTIN

*Counsel of Record

Pacific Legal Foundation

2700 Gateway Oaks Drive

Suite 200

Sacramento, California 95833

Telephone: (916) 641-8888

*Attorneys for Amicus Curiae,
Pacific Legal Foundation*

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IN SUPPORT OF PETITIONER**

IDENTITY AND INTERESTS OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner Robert E. Gibson. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF is submitting this brief because it believes its public policy perspective and litigation experience in the compelled dues arena (be they agency shop or state bar) will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Recently, PLF attorneys represented the petitioners in *Keller v. State Bar of California*, 495 U.S. ___, 110 L. Ed. 2d 1 (1990) (limiting the integrated bar's ability to spend objecting members' dues for political activities). Additionally PLF attorneys represented the petitioner in *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575 (1989) (limiting the use of objecting nonmembers' fees to those activities statutorily authorized in California's Educational Employment Relations Act). PLF filed a brief amicus curiae in this case supporting the grant of certiorari. PLF believes the Eleventh Circuit Court's opinion incorrectly analyzed the holdings of this Court which protect an individual's freedom of association and anonymity, resulting in objectors to the Bar's political and ideological expenditures being forced to choose between

their First Amendment right to object to nonchargeable expenditures by the Bar and their First Amendment right to remain anonymous in their associations and political beliefs.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir. 1990). The court held, *inter alia*, that the Florida Bar was not required to provide advance notice or reduction of dues for the proportion of dues that the Bar knew would be used for political or ideological activities; that objecting members of the Bar could be required to object on a particularized basis to each legislative policy with which they disagree; and that petitioner Gibson was not entitled to a refund of improperly collected dues.

SUMMARY OF ARGUMENT

The Florida Bar has established procedures to handle dissenting members' objections to Bar expenditures for political and ideological activities. The procedures, which require specific objections to each particular expenditure with which the member disagrees, violate the First Amendment guarantee of anonymous association.

This Court has long held that anonymity is a necessary corollary to the First Amendment freedom of association. Individuals have the constitutional right to

express unpopular opinions without bringing down upon themselves the wrath of the community, government, or other individuals who control some part of their lives. Attorneys in Florida are required to join the Florida Bar. But they are not required to agree with the political activities undertaken by the Bar, nor are they required to fund such activities. Moreover, they must not be required to forego the First Amendment right to anonymity to maintain the First Amendment right not to fund political activities.

The Florida Bar procedures chill protected speech. This Court has taken a commonsense approach to whether speech is chilled or not. Here, members of the Florida Bar are required to announce to the leadership of the Bar that they disagree with their policies. Florida lawyers may not practice law without the authorization of the Florida Bar. To affirm the Eleventh Circuit's decision upholding the Bar's procedures would place Florida lawyers in the position of publicly disagreeing with people who control their career in order to maintain their First Amendment rights.

ARGUMENT

I

THE RIGHT OF ANONYMOUS ASSOCIATION IS INHERENT IN THE FIRST AMENDMENT

The Eleventh Circuit Court of Appeals decision is flawed in many respects, but the most egregious defect is that the court held as constitutional the Florida Bar's

procedure that requires members to object to each particular legislative policy with which the members disagree. This decision contravenes decades-old decisions recognizing the right of anonymous association. See *National Association for the Advancement of Colored People v. Alabama* (N.A.A.C.P.), 357 U.S. 449, 460 (1958), and *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). The particularized objection procedure violates the objector's freedom of anonymous association by forcing the objector to announce beliefs unpopular with the leadership of the Bar. Here, then, the price of exercising one's First Amendment right to object to expenditures of compelled dues for political or ideological activities is the relinquishing of one's First Amendment right to remain anonymous in one's beliefs.

A. This Court Has Firmly Established Anonymity as a Necessary Corollary to Freedom of Speech and Association

This Court firmly espoused the principle that the right to refrain from disclosing one's beliefs or membership in an organization is a necessary and fundamental corollary to the freedom of association illustrated in *N.A.A.C.P.* and *Bates*. This Court in *N.A.A.C.P.* stated that

"on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of

petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *N.A.A.C.P.*, 357 U.S. at 462-63.

In *Bates*, this Court elaborated further on the freedoms at stake:

"Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.

"Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. 'It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'" *Bates*, 360 U.S. at 522-23 (quoting *N.A.A.C.P.*, 357 U.S. at 462) (emphasis added; citations omitted).

Beginning with *N.A.A.C.P.*, this Court recognized the importance of protecting anonymous political activity and has repeatedly reaffirmed that the Constitution protects against compelled disclosure of political associations and beliefs. See *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (statute held unconstitutional which undertook to compel every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing any organizations to which he or she might belong).

Because compelled disclosure of affiliation with groups can seriously infringe First Amendment rights (*Buckley v. Valeo*, 424 U.S. 1, 64 (1976)), disclosure laws that significantly encroach First Amendment rights must survive exacting scrutiny, and the state must establish a relevant correlation or substantial relation between the governmental interest and the information sought through disclosure. *Id.* at 64-65. Strict scrutiny is required even if the infringement on First Amendment rights arises "not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

Virginia's highest court addressed freedom of association in *N.A.A.C.P. Legal Defense and Educational Fund, Inc. v. Committee on Offenses Against the Administration of Justice*, 204 Va. 693 (1963). In that case, plaintiffs sought to quash a discovery order that would require production of membership lists. The court noted that there

"is ample uncontroverted testimony in the record . . . to show that many persons fear a disclosure of their names as associates or supporters of appellants' activities will bring upon

them harassment, intimidation, enmity and social and economic reprisal. This is evidenced by anonymous contributions made to avoid the threatened hostility of other persons in their community. . . . One would have to be deeply insensible to the affairs of present day life, or a modern Rip Van Winkle, to fail to observe the opposition . . . to the activities of the NAACP and its affiliates." *Id.* at 697-98.

The court held that disclosure of the names of N.A.A.C.P. supporters violated the freedom of association, concluding that while the state may conduct legislative investigations to protect its legitimate interests, Virginia exceeded its power by intruding into an area of constitutionally protected right of freedom and privacy of association, *id.* at 698. The state failed to show such an overriding and compelling state interest to justify substantial abridgment of associational freedoms, which disclosure of names of donors to appellants' activities would effect. *Id.* at 702.

In *Britt v. Superior Court*, 20 Cal. 3d 844 (1978), the California Supreme Court addressed the issue of whether one must espouse an *unpopular* cause to be protected by the First Amendment freedom of association. The answer is no. Constitutional protection is afforded to the privacy interests of members of *all* politically oriented associations. *Id.* at 854.

In that case, the defendant port district did not contest the constitutionally sanctioned nature of the associational activities, but instead argued that because the discovery order at issue did not prohibit the exercise of any such activities but merely required their disclosure, the order was not vulnerable to constitutional attack. The

California Supreme Court rejected that argument, reiterating this Court's mandate that freedom of association is protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Id.* at 852 (quoting *Bates*, 361 U.S. at 523). The court noted that even adherence to a cause that finds general support could nonetheless "raise the ire of municipal authorities or other individuals or business entities" who have interests contrary to the position espoused. *Britt*, 20 Cal. 3d at 854.

The Sixth Circuit addressed the N.A.A.C.P. line of cases in *Marshall v. Bramer*, 828 F.2d 355 (6th Cir. 1987). The court in that case, in which the plaintiff sought to protect the membership list of the local Ku Klux Klan, followed the rules of those cases, and applied strict scrutiny:

"[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a *substantial relation between the information sought and a subject of overriding and compelling state interest*. Absent such a relation between the NAACP and conduct in which the State may have a compelling regulatory concern, the Committee has not "demonstrated so cogent an interest in obtaining and making public" the membership information sought to be obtained as to "justify the substantial abridgment of associational freedom which such disclosures will effect." " *Id.* at 359 (citing *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963)) (emphasis in original).

Protection of the freedom of anonymous association is necessary to preserve individual liberties, to increase

the dissemination of diverse viewpoints, and to promote the structural goal of wide political participation. As the Ninth Circuit observed:

"The right of those expressing political, religious, social or economic views to maintain their anonymity is historic, fundamental, and all too often necessary. The advocacy of unpopular causes may lead to reprisals—not only by government, but by employers, colleagues, or society in general. While many who express their views may be willing to accept these consequences, others not so brave or not so free to do so will be discouraged from engaging in public advocacy." *Rosen v. Port of Portland*, 641 F.2d 1243, 1251 (9th Cir. 1981).

In *Rosen*, an ordinance requiring disclosure of members of a group desiring to distribute literature in a public forum was struck down as violative of the freedom of association and the correlative right to anonymity. The circuit court maintained that because the "expression of dissident or 'unsettling' views, by its very nature, invites retaliation and oppression, the identification requirement of the ordinance presents substantial dangers of 'chill and harassment.'" *Id.* See also *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1496 (9th Cir. 1987) (holding that because of " 'the vital relationship between freedom to associate and privacy in one's association,' " the members were entitled to opt for anonymity), and *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987) (" '[o]ffensive to the sensibilities of private citizens, identification requirements . . . even in their least intrusive form, must discourage . . . participation [in the preservation and strength of the democratic ideal]' ").

B. Public Disclosure of Opinions Contrary to the Leadership of the Bar Will Chill Protected Speech

This Court, while recognizing the careful scrutiny and balancing of constitutional rights that must inhere in every First Amendment case, has taken a very practical approach to analyzing the "chill" factor resulting from public disclosure of individuals' private beliefs and associations. A factual record of past harassment is not the only situation in which courts have upheld a First Amendment right of nondisclosure. The underlying inquiry must be whether a compelling governmental interest justifies governmental action that has "the practical effect 'of discouraging' the exercise of constitutionally protected political rights." *N.A.A.C.P.*, 357 U.S. at 461. This practical effect may take the form of "an unintended but inevitable result of the government's conduct in requiring disclosure." *Buckley v. Valeo*, 424 U.S. at 65. Thus, in *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968), although there was no evidence of past reprisals against contributors to the petitioner Republican Party of Arkansas, this Court held that it would be naive not to recognize that disclosure would impermissibly discourage the exercise of constitutional rights given the unpopularity of the Republican Party at that time.

One of the principal purposes of the constitutional protection of anonymous association is to free an individual to follow his conscience by ensuring that he need not " 'avoid any ties [simply because they] might displease those who control his [personal or] professional destiny.' " *Britt*, 20 Cal. 3d at 854-55. The source of the constitutional

protection of associational privacy is the recognition that, as a practical matter, compelled disclosure will often deter such constitutionally protected activities as potently as direct prohibition. *Id.* at 857.

In *Shelton v. Tucker*, 364 U.S. at 486, this Court struck down a state law requiring Arkansas teachers to disclose all organizations to which they belonged. As in *Pollard*, this Court took a commonsense approach and recognized that a chilling effect was inevitable if teachers who served at the absolute will of school boards had to disclose to the government all organizations to which they belonged. "[T]he pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id.*

Similarly, in this case, each member of the Bar is required to belong to that organization, and the leadership of the Bar has the capability of greatly affecting a member's career and livelihood. A member may have valid reasons for not wanting the Bar to know that he opposes their policies. Yet under the Florida Bar procedures, such a member must either publicly declare his dissent to each particular policy he opposes or surrender his First Amendment right not to support views he does not share.

Courts review the chilling effect as a practical matter, not a theoretical one.

"In seeking to identify the chilling effect of a statute our ultimate concern is not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation." *Community-Service Broadcasting*

of Mid-America, Inc. v. Federal Communications Commission, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

In *Community-Service Broadcasting*, the court could not specify with any degree of certainty the precise quantity of chill which is or will be produced by the statute at issue in that case. The court said:

"Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern. . . . The absence of . . . concrete evidence [of harassment] does not mandate dismissal of the claim out of hand; rather, it is the task of the court to evaluate the likelihood of any chilling effect, and to determine whether the risk involved is justified in light of the purposes served by the statute." 593 F.2d at 1118.

Similarly, the Second Circuit held that "[w]hether that chilling effect is an unconstitutional impairment of non-disclosure rights depends on an assessment of the weight of the asserted governmental interest and the degree of impairment of protected rights." *Local 1814, International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor*, 667 F.2d 267, 272 (2d Cir. 1981). In that case, the court emphasized that "it is appropriate in determining whether the governmental interest justifies the inevitable chilling effect of some disclosures to assess whether the disclosures will impact a group properly limited in number in light of the governmental objective to be achieved." *Id.* at 273.

Here, the Eleventh Circuit has totally disregarded the adverse effect resulting to objecting members from particularized objection. Because they fear reprisals, members will not be inclined to exercise their First Amendment right to object to the Bar's political expenditures. Furthermore, because such a minor amount of money is attached to each particular piece of legislation, the average member will likely find particularized objections too burdensome. Those members with very strong political beliefs will not necessarily be deterred by the burden of objecting, but they then run the risk of retaliation from the Bar for their unpopular views.

C. Past Harassment Need Not Be Proved to Establish a Freedom of Association Claim

The Fifth Circuit has emphasized that individuals with freedom of anonymous association claims need not prove past harassment to succeed on their claim. In *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), the ordinance at issue was declared unconstitutional even though it did not deter speech and association so much by the exposure of individuals' beliefs to public observation, as by the *threat* of exposure to public opprobrium and recrimination. *Id.* at 402. "The public opprobrium, reprisals, and threats of reprisals that attend the airing of one's affiliation with an unpopular cause . . . are substantial disincentives to engaging in such affiliations." *Id.* at 399. Disclosure in that case, as in this one, occurred only *after* members of the organization differentiated themselves as supporters of particular conduct.

The Eleventh Circuit summarily disposed of the particularized objection issue without analysis, accepting the Florida Bar's absurd argument that registering dissent does not reveal one's position. *Gibson*, 906 F.2d at 632. This Court specifically held otherwise in *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 n.42 (1977). In *Abood* this Court stated that a dissenter must not be required to make particularized objections because this "would confront an individual . . . with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." *Abood*, 431 U.S. at 241. In *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), the First Circuit relied on *Abood* to hold that the "primary feature of a constitutional system is that dissenters be able to trigger refunds by means of general objections so that they need not make public their views on specific issues." *Id.* at 635. *See also Galda v. Bloustein*, 686 F.2d 159, 169 (3d Cir. 1982) (refund mechanism held unconstitutional because in the absence of a compelling state interest, "a fee used to finance political activity cannot be exacted—even temporarily—from those unwilling to pay").

II

PARTICULARIZED OBJECTIONS VIOLATE THE RIGHT OF ANONYMOUS ASSOCIATION

Anonymity is essential to uninhibited political activity in a democratic society. Confidentiality prevents the fear of reprisal that threatens to suppress the vigorous interchange of ideas at the core of the First Amendment's

guarantee of free speech and association. American society is based on special indulgence to nurture the free expression of minority views. Because mere identification with certain disfavored ideologies can result in harassment which may silence those voices, the Constitution protects private support of political associations. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416, 417 (2d Cir. 1982).

The power of a government to repress dissent is substantial and can be exercised in myriad subtle ways. Anonymity is an essential element of freedom of association and the ability to express dissent effectively. As a result, removing the cloak of anonymity from those who object to the political and ideological stands taken by the Florida Bar threatens important First Amendment values. Such forced disclosure could likely lead to repercussions which consequently instill in the Bar members the fear of becoming linked with the unpopular or the unorthodox, and of suffering socially or economically because of that linkage.

This Court in *Hudson* described one remedial means to protect objectors' constitutional rights. The *Hudson* procedures are to be construed as the *minimum* requirements. *Hudson*, 475 U.S. 292 at 310. Through *Hudson* and *Keller*, unions and integrated bars were encouraged to experiment with procedures to achieve the least infringement on objectors' constitutional rights while still allowing the organization access to funds to which it is entitled. New procedures have been implemented by organizations all over the country since the *Hudson* decision, and met in the courts with varying success. The procedure at issue does not meet the policy goals set

forth in *Hudson* and *Keller*. *Hudson*, 475 U.S. at 302 n.9, 305-06; *Keller*, 110 L. Ed. 2d at 11.

The procedural deficiencies here are such that objectors to the Florida Bar's political and ideological expenditures cannot protect their First Amendment rights. The Bar does not permit advance reduction of dues, does not provide precollection notice of the amount of nonchargeable dues, and requires issue-by-issue objections over the course of the year. The Florida Bar's procedure is not only cumbersome, but designed to discourage all but the most zealous objector.

CONCLUSION

By choosing to enact procedures that require particularized objections and do not provide for advance notice or reduction, the Florida Bar ignored the First Amendment's protection of privacy of beliefs. The Eleventh Circuit erroneously upheld the procedures as constitutional, in contravention of express rulings to the contrary by this Court. The Eleventh Circuit decision should be reversed.

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Respectfully submitted,

RONALD A. ZUMBRUN

*ANTHONY T. CASO

DEBORAH J. MARTIN

*Counsel Of Record

Pacific Legal Foundation

2700 Gateway Oaks Drive

Suite 200

Sacramento, California 95833

Telephone: (916) 641-8888

Attorneys for Amicus Curiae,

Pacific Legal Foundation